Decision 02-11-003 November 7, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

AC Farms Sherwood, *et al.*, Complainants, vs. Southern California Edison Company, Defendant.	Case 02-04-003 (Filed April 4, 2002)

O P I N I O N

Summary

Case (C.) 02-04-003 is dismissed for failing to state a claim under Public Utilities Code Section 1702.

Background

Utility Cost Management LLC filed on behalf of Complainants seeking injunctive relief that would require Southern California Edison Company (Edison) to switch Complainants' electric service for wind machines from tariff Schedule PA-1 to tariff Schedule GS-1 (GS-1). Complainants are citrus growers who receive service from Edison and run wind machines typically on 75 to 100 horsepower (hp) motors.

Complainants argue that although GS-1 prohibits service to a customer whose maximum monthly demand is expected to exceed 20 kilowatts (kW), GS-1

does not specify "when" the customer is expected to do so.[1] Complainants assert that Schedule GS-1 is "non-sensical" because there is no time limit on when the customers would exceed 20 kW and therefore every customer might exceed 20 kW at some point in the future. Complainants further argue that a literal reading of the tariff language "expected to exceed" makes a nullity of "has exceeded" since if a load is expected to exceed 20 kW there is no reason to consider whether the load has exceeded 20 kW. Furthermore, Complainants contend Edison has transformed the tariff language from "demand" to "connected load" since demand is an actual measured quantity while connected load is a potential quantity. Complainants then compare this tariff language interpretation to Edison's interpretation of GS-2 language to conclude that there is an inconsistency in Edison's interpretations of the language for two similar tariff schedules. Complainants argue that Edison's interpretation of tariff language results in unfair discrimination in violation of Pubic Utilities Code Section 453.[2] Complainants also argue that Edison's interpretation of GS-1 is bad public policy since it encourages customers to avoid the PA-1 demand charge[3] by converting to diesel operation, thus resulting in air quality problems and a removal of customers from Edison's system.

---

[1] GS-1 also prohibits service if a customer has exceeded 20 kW in demand in any 3 months of the preceding 12 months.

[2] Pub. Util. Code Section 453 prohibits granting of any preference or advantage to any corporation or person or establishing or maintaining any unreasonable differences as to rates, services, charges, facilities or any other respect, either as between localities or as between classes of service. All references are to the Pub. Util. Code unless otherwise noted.

[3] PA-1 requires a monthly demand charge (currently $2.05 per hp of connected load), while GS-1 has no demand charge.

Complainants request two forms of relief. First, Complainants request that the Commission order Edison to permit Complainants' wind machines to take service on GS-1. Second, Complainants request that Edison refund Complainants an amount equal to the differential between charges under GS-1 and those charges paid by Complainants during the period from three years prior to the filing of this complaint until Complainants' accounts are switched to schedule GS-1. Complainants also request interest payments on the refunds.

Edison's Answer provides 11 separate and affirmative defenses. Edison asserts in its first defense that the Complainants have failed to state or allege any act or omission that violates any provision of law or order or rule of the Commission as required by Section 1702. Edison contends Complainants admit that under GS-1 a customer is ineligible for service if "in the opinion of Edison" the customer's monthly demand is expected to exceed 20 kW demand, or has exceeded 20 kW demand in any three months during the preceding 12 months. Edison explains that the Complainants' wind machines are expected to exceed 20 kW demand based on size, and that Complainants are asserting that the eligibility standard for GS-1 should be changed. Edison points out that Complainants provide no information regarding actual current service characteristics (current demand, account history, and load) and that the complaint essentially asserts that the eligibility criteria under GS 1 are unfair to customers that have high demand for limited durations.

Edison contends that this complaint is an untimely and improper petition to modify the GS-1 tariff adopted in Decision (D.) 92-06-020, Edison's last general rate case. Edison explains what criteria are necessary to modify GS-1,[4] but

[4] See Public Utilities Code Section 1708.

argues that the Complainants have not met those criteria. Furthermore, under Section 1708 a request to modify a decision must be made within one year of the effective date of the decision, or a party must explain why it could not petition for modification within one year. Edison notes that Complainants should have known about service under GS-1, and that any proposed modification at this time would occur 10 years after GS-1 was adopted, and therefore the complaint is untimely.

Edison's other defenses assert the complaint is barred by the applicable statutes of limitation, by waiver of Complainants (by acts and omissions) of each cause of action, and by failure of Complainants to mitigate damages. Edison further asserts: 1) Edison has complied with all applicable tariffs; 2) Complainants do not meet the standards and requirements of the tariffs; and 3) Complainants failed to satisfy a necessary condition precedent. Edison states it has correctly billed all accounts as required under Schedules PA-1, GS-1 and GS-2. Edison also argues that the complaint is improperly signed and there is no verification by customers.

Discussion

The material facts are not in dispute. There is no argument regarding the energy demand of the wind machines. Simple multiplication shows that the 75 to 100 hp machines demand approximately 56 kW to 75 kW per machine.[5] Applying this demand to GS-1 is also straightforward. Edison's GS-1, originally filed June 1992, clearly states that service under GS-1 is not available to

[5] One hp equals 0.749 kW.

customers . .” whose monthly maximum demand, in the opinion of the Company, is expected to exceed 20 kW or has exceeded 20 kW in any three months during the preceding 12 months.” This disqualifier language has not changed and is in effect today. Although Complainants disagree with the tariff language, this tariff, in effect for 10 years, provides that judgment of the customer’s monthly maximum demand is reserved to Edison and not the customer. If the purpose of Complainants’ arguments is to change the demand criterion, their remedy is under Section 1708 providing for modification of a previous Commission decision.[6]

Complainants allege that Edison’s interpretation of GS-1 results in unfair discrimination in violation of Section 453. Although Complainants clearly disagree with the tariff language in GS-1, they have not pursued this disagreement through application for rehearing or petition for modification the appropriate avenues.

Our review of Edison’s interpretation of its GS-1 tariff shows that Complainants’ arguments simply miss the mark. The tariff language of GS-1 clearly provides that Edison may, determine whether the expected demand of customers may exceed 20 kW. Edison has made this determination consistent with the language of GS-1. Edison has acted properly and in accordance with Commission-approved tariffs. Complainants have not alleged any violation of

[6] However, in order to proceed under Section 1708, Complainants must explain why they were unable to present their request within a year of the effective date of D.92-06-020 (June 3, 1992). Furthermore, if the Commission determines that the late submission has not been justified, it may on that ground issue a summary denial of the petition to modify. We note that Edison has a current general rate case proceeding in Application 02-05-004 filed May 3, 2002.

law or Commission rule consistent with Section 1702. Therefore, we will dismiss the complaint.

Comments on Draft Decision

The draft decision (DD) of the ALJ was mailed to the parties in accordance with Pub. Util. Code § 311(g) and Rule 77.7 of the Rules of Practice and Procedure.

Complainant timely filed comments on September 19, 2002, contending that the DD should be revised to address the merits of the legal arguments raised in the Complaint. Complainants argue that the DD incorrectly characterizes their argument regarding the GS-1 tariff, and state that complainants do not disagree with the GS-1 tariff but desire service under GS-1 as it is written. Complainants reiterate a number of arguments made in their Complaint, including arguments that the GS-1 language is ambiguous, and that the demand eligibility language in GS-1 should be applied in the same manner as Complaints believe Edison applies the demand language in GS-2. Complainants also argue that the DD suggests Edison has "unfettered" discretion in applying GS-1, and that the DD should address unfair discrimination arguments raised by the Complaint. Finally, Complainants disagree with Finding of Fact 6, addressing customer information, requesting an opportunity to amend the Complaint to provide this information. Complainants believe it is premature to dismiss this case, and that a hearing should be scheduled.

Edison did not file comments on the DD, however, it filed reply comments on September 27, three days late. Attached to Edison's reply comments is a Motion for Acceptance of Late-Filed Reply Comments. Edison's Motion states it was late in filing because it did not receive an electronic version of Complainants' comments, only the copy received through the U.S. Mail. The

mailed version was delivered to Edison's alternate attorney on the service list who was ill.

On October 2, Complainants filed an Opposition to Edison's Motion contending that Edison did not establish extraordinary circumstances since Complainants properly served Edison by U.S. Mail delivery to the names appearing on the service list. Complainants further argue that there is nothing extraordinary when attorneys are ill, and that Edison failed to file a Declaration under Penalty of Perjury as required by Rule 77.5. Complainant contends it followed the rules for filing and is prejudiced when Edison did not similarly follow the rules, and thus Edison's reply comments should not be accepted.

Rule 77.5 states that late-filed comments will ordinarily be rejected, except in extraordinary circumstances. Unfortunately, illness is one of those instances that cannot readily be anticipated, and can be extraordinary circumstance. We note that Edison's attorney expedited his response and was able to file the reply comments within a few days of the due date. Furthermore, Edison did not include any new information, or new arguments in its reply comments in an effort to take advantage of the late filing, and therefore there is no prejudice to Complainant. Although Edison did not provide an accompanying declaration, it did explain the reasons why the filing was late in its motion. In future motions involving late-filed comments or reply comments, we expect Edison to provide declarations setting forth all reasons for any late filings. We have considered the circumstances underlying Edison's motion and we grant the motion of Edison to late-file its reply comments.

Edison's reply comments support the DD as written, and contend that Complainants' comments are a reiteration of the same arguments made in the Complaint.

We have considered Complainants' comments, and Edison's reply comments. Complainant argues that GS-1 should be interpreted in a manner that permits service to customers owning wind machines that may exceed the demand maximum set forth in the language of GS-1. As we have already discussed, under GS-1 Edison is permitted to make the determination whether demand may exceed the maximum potential demand. This not a matter of whether Edison interprets GS-1 the same as GS-2 or any other tariff, but simply whether Edison has complied with the GS-1 tariff as it currently is written. Therefore, we make no changes to the DD and adopt it as written.

Assignment of Proceeding

Geoffrey Brown is the Assigned Commissioner and Bruce DeBerry is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. Complainants are citrus growers using wind machines of 75 to 100 hp.
2. Complainants' wind machines energy demand is approximately 56 kW to 74 kW per machine.
3. Complainants are served on Schedule PA-1, but desire service on Schedule GS-1.
4. Schedule GS-1 was filed in accordance with D.92-06-020 adopted June 3, 1992.
5. Schedule GS-1 prohibits service under that schedule if in the opinion of the utility the consumer's maximum monthly demand is expected to exceed 20 kW, or has exceeded 20 kW in any three months of the preceding 12 months.
6. Complainants did not provide customer information on load characteristics, account history, or current demand.
7. There is no triable issue of fact concerning any material event alleged in the complaint.

8. Edison has acted properly in its interpretation and implementation of GS-1.

Conclusions of Law

1. Complainants did not file for rehearing of D.92-06-020.
2. Complainants did not petition to modify D.92-06-020.
3. Complainants have not alleged any violation of law or Commission rule.
4. The Complaint should be dismissed for failure to state a claim under Public Utilities Code Section 1702, effective immediately.

O R D E R

IT IS ORDERED that:

1. The complaint in Case (C.) 02-04-003 is dismissed.
2. C.02-04-003 is closed.

This order is effective today.

Dated November 7, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners